

1 Richard J. Reynolds, Esq.  
2 Nevada Bar No. 11864  
3 E-mail: [rreynolds@bwslaw.com](mailto:rreynolds@bwslaw.com)  
4 BURKE, WILLIAMS & SORENSEN, LLP  
5 1851 East First Street, Suite 1550  
6 Santa Ana, CA 92705-4067  
7 Tel: 949.863.3363 Fax: 949.863.3350

8 Phillip A. Silvestri (SBN 11276)  
9 E-mail: [psilvestri@silgid.com](mailto:psilvestri@silgid.com)  
10 Neal D. Gidvani (SBN 11382)  
11 E-mail: [ngidvani@silgid.com](mailto:ngidvani@silgid.com)  
12 SILVESTRI GIDVANI, P.C.  
13 1810 East Sahara Avenue, Suite 1395  
14 Las Vegas, NV 89104  
15 Tel: 702.979.4597 Fax: 702.933.0647

16 Attorneys for Defendant, MTC FINANCIAL INC.  
17 dba TRUSTEE CORPS

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

12 UNITED STATES DISTRICT COURT  
13 DISTRICT OF NEVADA

15 MALCOLM AND SUZY HUNT,

16 Plaintiff,

17 vs.

18 MTC FINANCIAL, INC. DBA  
19 TRUSTEE CORPS, JPMORGAN  
CHASE BANK, N.A.

20 Defendants.

Case No. 3:14-cv-00359-MMD-WGC

21  
22  
23  
24  
25  
26  
27  
28  
**DEFENDANT MTC FINANCIAL INC. dba  
TRUSTEE CORPS' REPLY  
MEMORANDUM TO OPPOSITION (DOC  
14) MOTION TO DISMISS WITH  
PREJUDICE (DOC 9) THE PLAINTIFF'S  
COMPLAINT**

1                   Defendant MTC FINANCIAL INC. dba TRUSTEE CORPS ("TRUSTEE CORPS"), by  
 2 and through its counsel of record, hereby replies to Plaintiffs' Opposition to TRUSTEE CORPS'  
 3 Motion to Dismiss the Complaint including the First, Second, Third, and Fourth Causes of Action  
 4 *with prejudice* for failure to state a claim upon which relief may be granted.

5                   This reply is based upon the Memorandum of Points and Authorities submitted herewith,  
 6 and upon all pleadings, papers and documents on file herein, together with those matters of which  
 7 judicial notice has been requested, and any oral argument which may be presented at the time of  
 8 the hearing.

9                   **MEMORANDUM OF POINTS AND AUTHORITIES**

10                  **I. INTRODUCTION**

11                  The Opposition provides no assistance in support of the Complaint. The Complaint and  
 12 each cause of action therein fail to state a claim against TRUSTEE CORPS. Further, it is "over  
 13 the top" to assert TRUSTEE CORPS is a culpable actor when all that is revealed factually in  
 14 Plaintiffs' operative pleading is that TRUSTEE CORPS is merely a *ministerial* actor.

15                  No facts are pleaded to show TRUSTEE CORPS had any involvement in the loan  
 16 servicing or had knowledge of the loan servicing with respect to Plaintiffs' loan, other than  
 17 TRUSTEE CORPS' *bare knowledge* of what the loan servicer may have communicated to  
 18 TRUSTEE CORPS in order to start, stop, postpone, resume, or complete a foreclosure.

19                  TRUSTEE CORPS has no duty to supervise, manage, or oversee the conduct of the loan  
 20 servicer, and more specifically the loan servicer's conduct with respect to communicating issues  
 21 related mortgage foreclosure prevention alternatives to borrowers. There are no facts pleaded to  
 22 show TRUSTEE CORPS took on the duties of a loan servicer. If such duties legally existed for a  
 23 foreclosure trustee, TRUSTEE CORPS would no longer just be a foreclosure trustee, but it would  
 24 also become a loan servicer. This is not the intent of the law.

25                  Additionally, under the second and third claims, damages are not statutorily allowed since  
 26 there has been no sale. Also, attorneys' fees are discretionary under the second and third claims.  
 27 The attorneys' fees claims should be dismissed because the filing of the complaint was not out of  
 28 //

1 any immediate need to stop a sale, and there has never been a need to apply for a temporary  
 2 restraining order or preliminary injunction. Indeed, the latter was never filed.

3 **II. PLAINTIFFS HAVE NOT PLEADED A FIRST CLAIM FOR WRONGFUL**  
**FORECLOSURE FOR VIOLATION OF NRS 107.087 AGAINST TRUSTEE**  
**CORPS**

5 Plaintiffs' Opposition does not put forth any written argument in support of their first  
 6 claim. Since there are no arguments made to oppose the motion to dismiss as to the first claim,  
 7 the Court is respectfully requested to grant TRUSTEE CORPS' motion with prejudice.

8 **III. PLAINTIFFS' SECOND CLAIM FOR VIOLATION OF NRS 107.510 1, FOR THE**  
**VIOLATION OF NRS 107.500 FAILS TO STATE A CLAIM AGAINST TRUSTEE**  
**CORPS**

10 Plaintiffs' theory of "liability" (i.e. damages?) against TRUSTEE CORPS is grounded on  
 11 TRUSTEE CORPS recording a Notice of Default in "willful" violation of NRS 107. *Not a single*  
 12 *a fact is pleaded to show any "willful" violation of NRS 107* by TRUSTEE CORPS. The notice  
 13 given to a borrower referenced in NRS 107.500 is a notice to be sent out by the loan servicer.<sup>1</sup>

14 If such notice is not sent in violation of NRS 105.510 1., N.R.S. §107.560 states in  
 15 pertinent part:

16 "1. If a trustee's deed upon sale has not been recorded, a borrower may bring an  
 17 action for injunctive relief to enjoin a material violation of NRS 107.400 to  
 107.560, inclusive..."

18 2. After a trustee's deed upon sale has been recorded..., a borrower may bring a  
 19 civil action in the district court in the county in which the property is located to  
 recover his or her actual economic damages resulting from a material violation of  
 20 NRS 107.400 to 107.560, inclusive, by the mortgage servicer, mortgagee,  
 beneficiary of the deed of trust or an authorized agent of such a person,... If the  
 21 court finds that the material violation was intentional or reckless, or resulted from  
 willful misconduct by a mortgage servicer, mortgagee, beneficiary of the deed of  
 22 trust or an authorized agent of such a person, the court may award the borrower the  
 greater of treble actual damages or statutory damages of \$50,000..."

23 6. A court may award a prevailing borrower costs and reasonable attorney's fees  
 24 in an action brought pursuant to this section..."

25 The key here concerns whether TRUSTEE CORPS' conduct was "material" or substantial  
 26 in allegedly violating NRS 105.510 1. The notice referenced in NRS 107.500 (1) is a notice with  
 27

28 <sup>1</sup> Plaintiff refers to this notice as the "30 day letter" before recording the Notice of Default.

1 details concerning the loan in default including a summary of account to be sent out *by the loan*  
 2 *servicer* prior to the recording the Notice of Default.

3 As pleaded, the purported violation of NRS 107.510 1 [recording a Notice of Default by  
 4 TRUSTEE CORPS] allegedly prior to the loan servicer's alleged compliance with NRS 107.500  
 5 (1) is not pleaded as a material violation of NRS 107.510 1since nothing is pleaded factually to  
 6 show TRUSTEE CORPS had any involvement at all with preparing and sending out a notice  
 7 pursuant to NRS 107.500 (1), or that TRUSTEE CORPS had any knowledge that the loan  
 8 servicer complied with the statute beyond bare knowledge which may have been conveyed by the  
 9 loan servicer necessary to start, stop, postpone, resume, or completeg a foreclosure. TRUSTEE  
 10 CORPS has no duty to manage, oversee, or exercise quality control to insure the loan servicer's  
 11 compliance with its duties. Otherwise, the result is the foreclosure trustee assumes loan servicing  
 12 duties. Further, any alleged violation as stated above could not have been material because  
 13 Plaintiffs plead when this alleged violation occurred, Plaintiffs had an active loan modification  
 14 application pending. (Complaint, ¶31). Consequently, no alleged harm was caused or can be  
 15 pleaded under the second claim for the loan servicer failing to send them a "30 day letter", and  
 16 the second claim should be dismissed in its entirety.

17 Further, since no sale has taken place, a claim for damages neither exists nor can be  
 18 pleaded pursuant to N.R.S. §107.560 (Complaint, ¶27). The claim for damages is requested to be  
 19 dismissed with prejudice. Further, the claim for attorneys' fees is discretionary under N.R.S.  
 20 §107.560. The claim should be dismissed against TRUSTEE CORPS for all the reasons stated  
 21 above. Additionally, the Notice of Default was recorded April 3, 2014, and the complaint was not  
 22 filed until three months later in June, 2014. Plaintiff does not plead the necessity for an  
 23 immediate injunction or even the necessity for immediately having to file the complaint. Indeed,  
 24 no application for injunction has been filed. Thus, the claim for attorneys' fees should be  
 25 dismissed against TRUSTEE CORPS.

26       ///

27       ///

28       ///

1       **IV. THE THIRD CLAIM FOR VIOLATION OF N.R.S. 107.510 1.C FAILS AGAINST**  
 2       **TRUSTEE CORPS**

3       Plaintiffs claim that TRUSTEE CORPS recorded the Notice of Default in violation of  
 4       NRS 107.510 1.(c) by recording the Notice of Default while there was an active loan modification  
 5       application pending. Plaintiffs contend TRUSTEE CORPS conduct was a “willful” violation, but  
 6       Plaintiffs plead no facts whatsoever to show “willful” violation of NRS 107.510 1.(c) by  
 7       TRUSTEE CORPS.

8       Again, Plaintiffs cannot plead damages. NRS. §107.560 provides the mechanism for  
 9       bringing a claim for violation of N.R.S. §107.510. No foreclosure sale has occurred, so no  
 10       damages are permitted. Consequently, no damage claim can be made, and the claims for  
 11       damages should be dismissed (Complaint, ¶35). See, NRS §107.560 1. & 2.

12       Again, Plaintiffs cannot plead attorneys’ fees, which are discretionary. Plaintiffs found it  
 13       unnecessary to bring an application for an injunction with their complaint. The Notice of Default  
 14       was recorded April 3, 2014, and the complaint was not filed until three months later in June,  
 15       2014. Plaintiff does not plead the necessity for an immediate injunction or even the necessity for  
 16       immediately having to file the complaint. Indeed, no application for injunction has been filed.  
 17       Thus, the claim for attorneys’ fees should be dismissed against TRUSTEE CORPS.

18       Finally, Plaintiffs cannot plead any violation of N.R.S. 107.510 1.(c) for dual tracking  
 19       under N.R.S. 107.560 against TRUSTEE CORPS. N.R.S. §107.560 states in pertinent part, “1. If  
 20       a trustee’s deed upon sale has not been recorded, a borrower may bring an action for injunctive  
 21       relief to enjoin a *material* violation of NRS 107.400 to 107.560, inclusive...” (emphasis added.)

22       N.R.S. §107.560 requires the violation be *material*. Again, nothing is pleaded *factually* to  
 23       reflect TRUSTEE CORPS was involved in the loan modification process or what notices it  
 24       received from the loan servicer or trust deed beneficiary concerning the status of the loan  
 25       modification process. The loan servicer or trust deed beneficiary directs or instructs the  
 26       foreclosure trustee to stop, start, resume, or complete the foreclosure process based on the loan  
 27       servicer or trust deed beneficiary’s status or progress with respect to a loan modification  
 28       application. The status or progress a loan servicer makes with respect to a loan modification

1 application is not necessarily communicated to a foreclosure trustee beyond just communicating  
 2 bare facts for the foreclosure trustee to carry out its ministerial duties. TRUSTEE CORPS has no  
 3 duty to involve itself, evaluate, or second guess what the loan servicer or trust deed beneficiary is  
 4 doing with respect to a loan modification application and related process. Otherwise, it takes on  
 5 the duties of a loan servicer.

6 **V. THE FOURTH CLAIM FOR FRAUD FAILS AGAINST TRUSTEE CORPS**

7 In their Opposition, Plaintiffs incredibly assert they properly plead a fraud claim because  
 8 such claim is based on what is stated in the Notice of Default and then provide no further analysis  
 9 to support fraud (Opp., p. 4, lns. 14-21). According to Plaintiffs, the Notice of Default “speaks  
 10 for itself.” However, a careful perusal of the Complaint reflects no attempt to plead the elements  
 11 of fraud.

12 “The elements of intentional misrepresentation or common law fraud in Nevada  
 13 are: (1) a false representation made by the defendant; (2) defendant’s knowledge  
 14 or belief that the representation is false (or insufficient basis for making the  
 15 representation); (3) defendant’s intention to induce the plaintiff to act or to refrain  
 16 from acting in reliance upon the misrepresentation; (4) plaintiff’s justifiable  
 17 reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from  
 18 such reliance. *See Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev.1992).”  
*Nebab v. Bank of America, N.A.*, 2012 WL 2860660 \*4 (D.Nev.).

19 The pleading claims false representations made by “Defendants” as to the Affidavit  
 20 attached to the Notice of Default. The complaint does not plead what each specific representative  
 21 of a specific defendant represented that was false. The “Defendants” are lumped together with  
 22 respect to making alleged false representations. This is unacceptable.

23 Plaintiffs do not plead factually how TRUSTEE CORPS purportedly knew the facts  
 24 asserted or represented about Defendant Chase National Bank, N.A. (“Chase”) were allegedly  
 25 false. This element of fraud is missing, so fraud is not pleaded.

26 Plaintiffs factually plead nowhere in the count that they justifiably relied on any  
 27 representation made in the Notice of Default. Again, fraud is not pleaded.

28 Finally, damages are not factually pleaded. A foreclosure sale did not occur and Plaintiffs  
 plead no monetary losses. Thus, the count should be dismissed with prejudice.

///

1     **VI. CONCLUSION**

2           In order to survive a motion to dismiss for failure to state a claim, a complaint must set  
 3 forth enough facts to state a claim for relief that is plausible on its face. A Court need not permit  
 4 an attempt to amend a complaint if, as here, it determines that the pleading could not possibly be  
 5 cured by allegations of other facts. Albrecht v. Lund, 845 F.2d 193, 195-196 (9th Cir. 1988) (no  
 6 liability as a matter of law); Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)  
 7 (amendment futile). Accordingly, the Complaint as to TRUSTEE CORPS should be dismissed  
 8 *without leave to amend*.

9           Dated: August 12, 2014

10           Burke, Williams & Sorensen, LLP  
 11           1851 East First Street, Suite 1550  
 12           Santa Ana, CA 92705-406713           By: /s/ Richard J. Reynolds  
 14           Richard J. Reynolds  
 15           Attorneys for Plaintiff16           Phillip A. Silvestri  
 17           Neal D. Gidvani  
 18           SILVESTRI GIDVANI, P.C.  
 19           1810 East Sahara Avenue, Suite 1395  
 20           Las Vegas, NV 8910421           Attorneys for Defendant, MTC FINANCIAL  
 22           INC., dba TRUSTEE CORPS

## **CERTIFICATE OF SERVICE**

Pursuant to L.R., Part II, 5-4, I certify that I am an employee of BURKE, WILLIAMS & SORENSEN, LLP, and that on August 12, 2014, I caused to be served a true copy of the **DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' REPLY MEMORANDUM TO OPPOSITION (DOC 14) MOTION TO DISMISS WITH PREJUDICE (DOC 9) THE PLAINTIFF'S COMPLAINT** addressed to all parties and counsel as identified on the Court-generated Notice of Electronic Filing; all counsel being registered to receive CM/ECF Electronic Filing as follows:

- **Richard J. Reynolds** – rreynolds@bwslaw.com, dwetters@bwslaw.com, psoeffner@bwslaw.com, mslobodien@bwslaw.com
- **Jordan J Butler** - jjb@slwlaw.com,cjm@slwlaw.com
- **Karlon J Kidder** - kjk@kidderlawgroup.com
- **Kent F Larsen** - kfl@slwlaw.com,cjm@slwlaw.com

Patti Soeffner  
Patti Soeffner